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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JEFFREY NOEM VETA, Appellant.	2 CA-CR 2004-0251 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR52826

Honorable Christopher C. Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Jeffrey Noem Veta — Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Jeffrey Noem Veta was convicted after a jury trial of one count of continuous sexual abuse of a child, one count of involving minors in drug offenses, and two counts of sexual conduct with a minor, all class two felonies and dangerous crimes against children under A.R.S. § 13-604.01. The court imposed consecutive, presumptive twenty-year terms of imprisonment for each count pursuant to that statute. On appeal, Veta claims his speedy trial rights were violated, the court erred by giving a particular jury instruction, and he was improperly sentenced pursuant to § 13-604.01. Finding no error, we affirm.

Procedural Background

¶2 In 1996, Veta was indicted on thirteen counts of various sexual offenses against A. and M. As part of that indictment, the state filed an allegation that twelve of the thirteen counts, including the offenses Veta was eventually convicted of, were dangerous crimes against children pursuant to § 13-604.01. Veta was not apprehended until 2002, when he was discovered in a federal prison in Kentucky and extradited to Arizona for trial. Prior to trial, Veta filed a petition for a writ of habeas corpus, claiming his speedy trial rights had been violated. His petition was denied by the trial court and, on review, this court denied relief. *See State v. Veta*, No. 2 CA-CV 2003-0043 (memorandum decision filed Dec. 5, 2003). Veta's trial eventually began in April 2004, and he was convicted and sentenced as noted above. This appeal followed.

Speedy Trial Issues

¶3 The first four issues Veta raises on appeal are variations on the single claim that his speedy trial rights were violated. As noted above, Veta filed a pre-trial petition for a writ of habeas corpus seeking dismissal of the charges against him and his release from custody, based on the same claims. *See Veta*, No. 2 CA-CV 2003-0043. On review of the trial court's denial of Veta's petition, this court addressed the merits of his claims and found them waived by the conduct of Veta and his counsel. *Id*.

¶4 "Ordinarily, a decision of an appeals court in a prior appeal of the same case settles the law for an appellate court in a subsequent appeal." *State v. Waldrip*, 111 Ariz. 516, 518, 533 P.2d 1151, 1153 (1975). This is the doctrine of the law of the case.[1] *See State v. Whelan*, 208 Ariz. 168, ¶ 8, 91 P.3d 1011, 1014 (App. 2004). "As to the parties involved in the decision and upon remand or subsequent proceedings in the same case, a memorandum decision constitutes the law of the case." *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). The doctrine applies through "all the subsequent proceedings . . . in both the trial and appellate courts, provided the facts and issues are

[1]The state argues Veta is barred from raising these issues under the doctrine of res judicata, but it is actually the law of the case doctrine that applies here. "Under the doctrine of res judicata, judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action," but "'[l]aw of the case' concerns the practice of refusing to open questions previously decided in the same case by the same court or a higher appellate court." *Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 327, 868 P.2d 335, 340 (App. 1993).

substantially the same." *Center Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, ¶ 17, 153 P.2d 374, 377 (App. 2007).

¶5 In Veta's case, the only difference between his habeas corpus petition and this appeal was that his trial was significantly delayed, at least partially at Veta's request, for nearly two years beyond the date that he originally claimed violated his speedy trial rights. Because this fact supports our previous finding that Veta had waived his speedy trial rights through his conduct, it would not have changed our decision to deny relief on his petition. Accordingly, that decision is the law of the case and we see no reason to address this issue again. *See Dancing Sunshines*, 149 Ariz. at 482, 720 P.2d at 83.

Jury Instruction

¶6 Veta contends the trial court erred by instructing the jury that it was permitted to consider any evidence of his "hiding" in reaching a verdict. The state responds that sufficient evidence was introduced at trial to support the instruction and it was properly given. We have not been directed to any portion of the record that shows Veta objected to this particular instruction at trial, and thus he has forfeited all but fundamental error review. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (failure to raise issue at trial, including jury instructions, waives right to raise issue on appeal).

¶7 We review a trial court's decision to give a particular instruction for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). A trial court may properly give an instruction on any theory that is reasonably supported by the

evidence. *See State v. Cruz*, 189 Ariz. 29, 31, 938 P.2d 78, 80 (App. 1996). On appeal, we view the evidence in the light most favorable to sustaining the decisions below. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). The core of Veta's argument is that there was no evidence presented at trial to support the giving of this instruction.[2]

¶8 The trial court instructed the jury as follows:

> In determining whether the state has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's hiding, together with all the other evidence in the case. You may also consider the defendant's reasons for hiding. Hiding after a crime has been committed does not by itself prove guilt.

If the evidence suggests "the accused attempted to conceal himself," then this type of instruction is proper. *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983). Such an attempt at concealment by the accused "can certainly be read as revealing a consciousness of guilt," and that is the basis for the instruction. *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992); *see also State v. Noleen*, 142 Ariz. 101, 108, 688 P.2d 993, 1000 (1984) (instruction proper when evidence "'support[s] the inference that the accused utilized the element of concealment or attempted concealment'"), *quoting State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976); *State v. Loyd*, 126 Ariz. 364, 367, 616 P.2d 39, 42 (1980) (fact appellant fled state and used different name sufficient to justify flight

[2]In his brief, Veta suggests that, because the facts at trial were not identical to hypothetical evidence the court outlined in ruling on the issue at trial, the evidence was not sufficient. However, as discussed below, this is not the standard of review.

instruction); *State v. Speers*, 209 Ariz. 125, ¶ 31, 98 P.3d 560, 568 (App. 2004) (evidence must demonstrate defendant's actions made "him harder to find or camouflage[d] his activities" to justify flight instruction).

¶9 At trial, Terese, the mother of Veta's victims, testified that her eldest son, who was not a victim, had informed Veta about the accusations. After that, Veta called Terese several times, asking each time if she was recording his calls.[3] Although Veta initiated the contact with Terese and stated he wanted to see his children, he refused to tell her where he was. Terese also testified she had not seen Veta again and he had abandoned "everything" in his trailer, including his clothes, items borrowed from friends, his birth certificate, and personal photographs, after he found out about the accusations. The only item Terese could identify that Veta had apparently taken with him was "a special pillow for his neck."

¶10 Retired Tucson Police Detective Carrillo, who investigated the case in 1996, had unsuccessfully attempted to locate Veta at the trailer, at the radio station where he worked, and at his parents' home in Phoenix. Carrillo was never able to find Veta during his investigation. Gula "Myke" Palmer, Veta's childhood skating coach, testified she too had attempted to contact Veta during this time, but "couldn't find him" and had contacted his parents for assistance. Based on this evidence, the jury reasonably could infer that Veta had

[3]Eventually, Veta made incriminating admissions during a call Terese recorded, an action she testified was prompted by his obvious concern about whether or not he was being recorded.

absented himself in order to avoid facing the accusations against him. Because the evidence supported the "hiding" instruction, the court did not abuse its discretion in giving it.[4]

¶11 Additionally, Veta has failed to show that any potential error was fundamental, that is, "error [that] goes to the foundation of the case or deprives [him] of an essential right to his defense." *State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989). Veta bears the burden of showing that fundamental error occurred and that the error caused him prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). He has not done so.

Sentence Enhancement

¶12 Veta lastly complains he was improperly sentenced under A.R.S. § 13-604.01, the dangerous crimes against children statute, because he "received no notice of any . . . enhancement[] as to the amended indictment." As noted above, Veta was originally indicted on thirteen counts involving two victims, with an allegation that twelve of those offenses were dangerous crimes against children. Prior to trial, the state moved to amend Veta's indictment to accommodate changes in its interpretation of A.R.S. § 13-1417, the continuous sexual abuse of a child statute, during the eight years since he had been indicted. This amendment sought to combine the three separate counts of Continuous Sexual Abuse into a single count. The state also sought to dismiss two additional counts of sexual conduct with

[4]Veta also claims the prosecutor committed misconduct in her closing argument. But the remarks Veta complains about were based on testimony presented to the jury and reasonable inferences from that evidence. Veta again relies on the premise that the evidence had to be identical to the hypothetical situation mentioned by the trial court in ruling on the issue, but that is not the standard for prosecutorial misconduct.

a minor and one count of molestation based on specific, identifiable occurrences during the same time period, to reflect the state's determination that the statute was intended "to include all counts of molestation and sexual conduct in one count of continuous sexual abuse" within a specific period of time. *See* A.R.S. § 13-1417(D); *see also State v. Ramsey*, 211 Ariz. 529, ¶ 8, 124 P.3d 756, 760 (App. 2005) ("subsection (D) . . . addresses what charges may be brought in a current proceeding involving a charge under § 13-1417"). The trial court granted the state's motion, finding "[t]he amendment of the Indictment does not operate to change the nature of the offense charged or to prejudice the Defendant." The court also noted the amendment reduced Veta's "criminal exposure" and that "[n]o new charges are being added and the Defendant specifically was on notice of all charges set forth in the original Indictment."

¶13 In Veta's original indictment, the state had included a separate allegation of dangerous crimes against children for counts one through twelve. After the amendment, counts one through six of the original indictment had been replaced by an amended count one.[5] The remaining counts were unchanged. Thus, Veta's argument that he lacked notice of the dangerous crimes allegation could only apply to the amended count. However, the state's allegation clearly stated "the offenses of continuous sexual abuse of a child, as charged in Counts One, Two and Four, . . . are offenses involving a dangerous crime against

[5]It appears that no written supervening indictment was filed, although the amended charges were read to the jury at the beginning of trial.

children." The amendment simply merged those three original counts of continuous sexual abuse of a child into an amended count one. It is therefore clear Veta received notice that he was being charged with continuous sexual abuse of a child as a dangerous crime against children, whether it was one count or three.

¶14 Moreover, although he was aware of it, Veta did not object to this dangerous crimes enhancement at trial or at sentencing. During a discussion of potential lesser-included offenses, Veta's counsel determined there would have been no benefit to giving particular lesser-included instructions because those offenses were "still [dangerous crimes against children]" and Veta would receive no sentencing benefit if convicted of them. This undercuts Veta's argument that he lacked notice of the dangerous crimes against children allegation.

¶15 Finally, on each verdict form in which the jury had found Veta guilty, the jury answered a special interrogatory about the age of the victim. As to the involving minors in drug offenses count, the jury found the victim had been under the age of fifteen. Section 13-3409(B), A.R.S., defines that crime and specifically provides that when the minor involved is under fifteen, the offense is punishable under § 13-604.01 as a dangerous crime against children. The jury also specifically found the victim of each count of sexual conduct with a minor was under the age of fifteen. Section 13-1405, A.R.S., defines sexual conduct with a minor and states that when the victim is less than fifteen years old, the offense is punishable pursuant to § 13-604.01. The jury additionally found that the victim of the

continuous sexual abuse of a child count was under the age of fourteen. However, A.R.S. § 13-1417(B) makes that offense punishable pursuant to § 13-604.01 regardless of the victim's age. Thus, even if Veta's claim that he lacked notice under the amended indictment had any merit, he nevertheless had notice that § 13-604.01 would apply to him because the statutes defining the offenses he was charged with provide for sentencing under that statute. *See Raney v. Lindberg*, 206 Ariz. 193, ¶ 6, 76 P.3d 867, 870 (App. 2003) ("A charging document provides a defendant with the requisite notice [of the range of potential sentences] by citing the applicable statutes pertaining to the charged crime(s) in compliance with Arizona Rule of Criminal Procedure 13.2(b).").

Disposition

¶16 Veta's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge